STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2003
v	No. 236550 Eaton Circuit Court
THOMAS GERARD JOHNSON, Defendant-Appellant.	LC No. 01-020147-FH

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of two counts of resisting and obstructing a police officer, MCL 750.479, and one count of drunk and disorderly conduct, MCL 750.167. Defendant was subsequently sentenced as a fourth felony habitual offender, MCL 769.12, to 46 to 180 months' imprisonment for the resisting and obstructing convictions and 90 days for the drunk and disorderly conviction. We affirm.

Defendant contends that he was deprived of his right to the effective assistance of counsel by his trial counsel's failure to move to dismiss one of the counts of resisting and obstructing because venue was inappropriate, his failure to move for a mistrial when a sheriff's deputy gave an unresponsive and prejudicial answer, his failure to object to the presentation of—and argument concerning—witnesses from St. Lawrence Hospital, and his failure to challenge the admission of irrelevant and prejudicial testimony. Defendant also contends that the trial court committed error requiring reversal when it failed to control the trial proceedings by sua sponte declaring a mistrial and by preventing the admission of improper testimony and evidence.

Defendant failed to move for a new trial or an evidentiary hearing on the basis of ineffective assistance of counsel; therefore, this Court's review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). If the record does not support the defendant's claims, he has waived the issue. *Id.* at 659. This Court reviews de novo a claim of ineffective assistance to determine if the defendant has established that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance is presumed, and the defendant bears a heavy

burden of proving that his counsel was ineffective. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant first argues that his counsel was ineffective for failing to move to quash the count of resisting and obstructing based on defendant's actions while being transported to the Eaton County jail because venue concerning these acts was in Ingham County. Venue is a component of every criminal offense and must be proven beyond a reasonable doubt, but it is not an essential element of a crime. *People v Meredith*, 209 Mich App 403, 408; 531 NW2d 749 (1995). Moreover, "[n]o verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury." MCL 767.45(1)(c).

Defendant failed to object in the trial court and therefore waived consideration of the underlying venue issue on appeal. *People v Henderson*, 45 Mich App 511, 513; 206 NW2d 771 (1973), aff'd 391 Mich 612 (1974). In the context of an ineffective assistance of counsel claim, defendant may obtain relief if he can show that, but for counsel's failure to object to the venue, there is a reasonable probability that the result of the proceeding would have been different. *Pickens*, *supra* at 314, quoting *Strickland*, *supra* at 694.

MCL 762.8 provides:

> Whenever a felony consists or is the culmination of two [2] or more acts done in the perpetration thereof, said felony may be prosecuted in any county in which one of said acts was committed.

The statute uses the word "acts" rather than the word "elements." *People v Jones*, 159 Mich App 758, 761; 406 NW2d 843 (1987). The act of transporting defendant commenced in Eaton County and was not completed until defendant was delivered to the Eaton County jail. During the course of this transportation, defendant committed the second resisting and obstructing offense by attempting to escape and assaulting a sheriff's deputy at the hospital. Therefore, venue was proper in Eaton County under MCL 762.8.

Moreover, our Supreme Court has held that the prosecution must join in one prosecution all criminal charges that arise out of a continuous time sequence and display a single intent and goal. *People v White*, 390 Mich 245, 259; 212 NW2d 222 (1973). After considering MCL 762.8, the Court in *White* applied its "same transaction" requirement to the facts of that case and concluded that separate offenses should have been prosecuted in the same proceeding even though the offenses occurred in two different jurisdictions. *Id.* at 262. See also *People v Slifco*, 162 Mich App 758, 762; 413 NW2d 102 (1987); *People v Flaherty*, 165 Mich App 113, 119; 418 NW2d 695 (1987).

The resisting and obstructing charges occurred in the course of a lengthy and continuing incident that involved defendant and two Eaton County Sheriff's deputies. One of these charges occurred during the course of transporting defendant to the Eaton County jail when he resisted and obstructed the deputy at the hospital by attempting to escape and by assaulting him. The resisting and obstructing charges that occurred at the bar and the one that occurred at the hospital both arose out of defendant's intent to prevent the police from arresting him. Thus, the offenses

occurred in a continuous time sequence and displayed a single intent and goal. Under the *White* same transaction test and MCL 762.8, the prosecutor properly brought all the criminal charges arising out of the events of the night of March 24, 2001, in a single prosecution in Eaton County.

Because the prosecutor properly brought these charges in Eaton County, a motion to dismiss the resisting and obstructing charge based on defendant's conduct at the hospital in Ingham County would not have been granted. Defense counsel is not required to make meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Defendant has therefore failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation deprived him of his right to a fair trial.

Defendant next argues that his trial counsel was ineffective for failing to object to, or request the declaration of a mistrial based on, an unresponsive and prejudicial answer given by a sheriff's deputy during cross-examination. The decision whether to declare a mistrial is committed to the sound discretion of the trial court. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant." *Id.* Generally, an unresponsive, volunteered answer to a proper question is not the basis for a mistrial. *Id.; People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988).

The deputy's answer was responsive to the question and, given the extensive testimony concerning defendant's behavior, his brief reference to an earlier incident could have caused only minimal prejudice. Accordingly, a mistrial would not have been appropriate and counsel was not ineffective for failing to make a futile request. *Darden*, *supra* at 605. Moreover, ineffective assistance will generally not be found with regard to matters of trial strategy. *People v Harris*, 133 Mich App 646, 654; 350 NW2d 305 (1984). Counsel's decision not to object, and thereby call attention to the answer, was a matter of trial strategy which we will not second-guess. *Pickens*, *supra* at 330.

Defendant next argues that his trial counsel should have objected to the prosecutor's presentation of hospital employee witnesses. Defendant contends that their testimony was irrelevant because any criminal acts committed by defendant at the hospital should have been charged in a separate proceeding by the Ingham County prosecutor. We have concluded that defendant's acts of resisting and obstructing while in custody at St. Lawrence Hospital were properly charged by the Eaton County prosecutor. Therefore, any objection to the presentation of the hospital witnesses would have been meritless, and trial counsel was not ineffective for declining to make meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant next argues that his trial counsel was ineffective because he failed to object to the prejudicial testimony of the deputies and the hospital witnesses concerning defendant's obscene and threatening statements. Defendant contends that the minimal probative value of this testimony was substantially outweighed by the danger of unfair prejudice and that trial counsel therefore should have sought exclusion of the testimony under MRE 403.

The threats that defendant made to the deputies and the hospital personnel substantiated the deputies' testimony that defendant was out of control and that he resisted their attempts to place him in lawful custody and to transport him to jail. Therefore, the statements were relevant

and material to a contested issue at trial and they had significant probative value because they assisted the prosecutor in proving the case. MRE 401; *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). They were also properly admissible as the admissions of a party-opponent, MRE 801(d)(2)(A); *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002), and because they demonstrated defendant's state of mind at the time of the incident. *People v Ortiz-Kehoe*, 237 Mich App 508, 517; 603 NW2d 802 (1999).

Accordingly, an objection would have been futile. Counsel is not ineffective for failing to raise a futile objection. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997). Moreover, the decision whether to object to particular testimony is a matter committed to trial strategy and this Court does not second-guess such decisions. *Pickens*, *supra* at 330.

Defendant also asserts that the cumulative effect of these alleged errors warrants reversal of his conviction. While one error in a case may not warrant reversal of a defendant's conviction, the cumulative effect of a number of errors may constitute error requiring reversal. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). However, in making such a determination, the court only considers the cumulative effect of actual errors. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). This Court has not found error with regard to any of the issues raised by defendant; therefore, there is no cumulative effect to consider.

Finally, defendant argues that the trial court committed error requiring reversal by failing to control the proceedings at trial as required by MCR 6.414(A). Defendant failed to object to the manner in which the trial court presided over the trial, so this argument is not preserved for appellate review. *People v Grant*, 445 Mich 535, 544-547, 551-552; 520 NW2d 123 (1994); *People v Mayhew*, 236 Mich App 112, 121; 600 NW2d 370 (1999). Unpreserved issues are reviewed on appeal for plain error. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999). This Court may only reverse if it finds a plain error that affects the defendant's substantial rights; that is, that an actually innocent defendant was convicted or that the error "seriously affect[ed] the fairness, integrity or public reputation of the judicial proceedings." *Id.* at 763.

"A trial court has broad discretion in regard to controlling trial proceedings. MCL 768.29." *People v Taylor*, 252 Mich App 519, 522; 652 NW2d 526 (2002). See also MCR 6.414(A) and MRE 611(a). This Court has concluded that the unresponsive answer of the sheriff's deputy did not justify the sua sponte declaration of a mistrial and that the testimony of the deputies and the hospital witnesses concerning defendant's behavior and language was properly admitted. Therefore, it follows that the trial court could not have violated its duty to maintain control over the trial by declining to interject itself into the proceedings and raise objections that defense counsel chose not to make or permit testimony that defense counsel chose not to challenge. Therefore, defendant has failed to demonstrate plain error that affected his substantial rights.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald